STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 4, 2003
v	No. 242339 Hillsdale Circuit Court
LEE CHARLES BRADFORD, Defendant-Appellant.	LC No. 01-259131-FH

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

On Friday, December 1, 2001, $15,100 was stolen from the North Adams Branch of the Southern Michigan Bank and Trust by an armed robber. Defendant was charged with the crime, and was duly convicted by a jury of his peers. Defendant now appeals as of right his jury trial convictions for one count of armed robbery, MCL 750.529, one count of possession of a firearm during the commission of a felony, MCL 750.227b, and one count of possession of a firearm by a felon, MCL 750.224f. Defendant was sentenced to thirty-seven to sixty years' imprisonment for the armed robbery conviction, two years' imprisonment for the felony-firearm conviction, and six years and four months to twenty years' imprisonment for the felon in possession conviction.[1] We affirm.

I. Offense Variable (OV) 1

Defendant first argues that OV 1 should not have been scored fifteen points because the gun used in the robbery was not pointed directly at a victim. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Offense variable 1 relates to the aggravated use of a weapon, and instructs the sentencing court to "[s]core offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points . . . ."

[1] Defendant was sentenced as a fourth habitual offender pursuant to MCL 769.12, in connection with the armed robbery and felon in possession convictions.

MCL 777.31. Fifteen points are to be scored when "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." MCL 777.31(1)(c).

We find that the trial court did not abuse its discretion in scoring OV 1 at fifteen points. There was sufficient evidence presented at trial to demonstrate that a firearm was pointed *toward* a victim. At trial, Rhonda Baker, a bank teller at the North Adams Branch of the Southern Michigan Bank and Trust, testified that, although defendant did not point the gun at her, defendant was waving the gun around, and she feared defendant might shoot somebody. Baker also indicated that defendant had the gun in his hand, which was "pretty close" to her face. Finally, Baker stated that she was not watching defendant, but rather, she was watching the gun because she did not want it to "go off" in her face. Additionally, Leonce Towers, another bank teller, testified that as defendant entered, he was "waving the gun around." Finally, Shelley Reed, also a bank teller, testified that defendant entered with a gun, waving it, and telling the three tellers not to hit their alarms and to get down. Although none of the witnesses testified that defendant pointed the firearm directly *at* them, the testimony reveals that the firearm was pointed *toward* them, as evidenced by defendant's waving the firearm around, and Baker's testimony that defendant had the firearm "pretty close" to her face along with her fear that the firearm might be discharged in her face. Because there is evidence to support the trial court's score of fifteen points for OV 1, the trial court did not abuse its discretion.

II. Ineffective Assistance of Counsel

Defendant next argues that he was denied the effective assistance of trial counsel, Roderick Dunham. We disagree. Appellate review of claims regarding the effective assistance of counsel involves a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's findings of fact for clear error, while questions of constitutional law are reviewed de novo. *Id*.

> To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690-691; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). [*People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).]

A. Failure to Call Alibi Witnesses

Defendant first contends that Dunham was ineffective because he refused to interview and/or call Charles "Chuck" Cunningham and Michael "Mike" Cunningham as alibi witnesses. We disagree.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). In this case, Dunham stated at the *Ginther*[2] hearing that the only indication that Michael or Charles would provide an alibi for defendant came from defendant. Dunham found that, after interviewing Charles, Charles did not clearly remember anything useful regarding the day in question, and that Charles was "absolutely no help in what he was going to testify about." Dunham advised defendant that Charles should not be presented as an alibi witness because he was basically "worthless" as an alibi witness due to his lack of memory and reluctance to testify. Regarding Michael, Dunham indicated that he did not speak to Michael prior to trial and that he did not subpoena Michael for trial because defendant's wife, Lisa Bradford, informed Dunham that Michael knew absolutely nothing about the case, and that only Charles was possibly at the store on the day in question. Dunham then decided to narrow the alibi witness list down to exclude Michael as a witness.

The record indicates that after performing an investigation on the two potential alibi witnesses, Dunham subsequently concluded that Charles would be a potentially better alibi witness due to Michael's lack of knowledge regarding the day in question. Although Dunham subpoenaed Charles for trial, Dunham concluded that Charles would not be an appropriate witness because he did not recall the day in question and demonstrated a reluctance to testify. Indeed, defendant failed to present the testimony of either Michael or Charles at the *Ginther* hearing to illustrate the witnesses' proposed testimony. As this Court must refrain from substituting its judgment for that of trial counsel regarding matters of trial strategy, *Rockey*, *supra* at 76, we find that defendant has failed to demonstrate that Dunham's performance was objectively unreasonable, or that defendant was prejudiced by counsel's defective performance.

B. Conflict of Interest

Defendant next argues that defense counsel was ineffective because Dunham's partner represented Richard Rieger, an alleged "key witness" for the prosecution, in a divorce proceeding prior to trial, and that this prior representation inhibited Dunham from thoroughly cross-examining Rieger. In order to demonstrate that a conflict of interest has violated a defendant's constitutional right to the effective assistance of counsel, the defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 555-556; 581 NW2d 654 (1998).

Defendant has failed to demonstrate that an actual conflict of interest adversely affected Dunham's performance, and has failed to allege any specific area of cross-examination was neglected or avoided due to an alleged conflict of interest. "'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.'" *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citation omitted).

Furthermore, after reviewing the record, we find no indication that Dunham actively lessened his defense, or that an actual conflict of interest adversely affected Dunham's

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

performance. At trial, Dunham effectively elicited testimony from Rieger, which demonstrated that defendant consistently made his monthly house payments at the last minute, and that defendant had ensured Rieger that he would be paid on the first of December. Rieger indicated, on cross-examination, that prior to December 1, defendant had been in contact with Rieger on several occasions, and that defendant consistently indicated that payment would be made on the first of December. Also on cross-examination, Rieger indicated that defendant was not in danger of going into default on his payments on the house. Finally, Rieger conceded that he was familiar with defendant's method of paying at the last minute because that was the nature of defendant's store business. Thus, Rieger's cross-examination testimony actually bolstered defendant's testimony and theory, and presents no indication that Dunham's performance was adversely affected.

C. Failure to Object to Improper Evidence

Defendant also claims that Dunham was ineffective for failing to sufficiently investigate the case prior to trial. Specifically, defendant contends that Dunham's performance was ineffective because he should have learned that the ski mask was contaminated with dog hair prior to trial so he could bring a motion to suppress the evidence before the jury learned of it.

At the *Ginther* hearing, Dunham indicated that he and defendant had a disagreement regarding the ski mask evidence. Whereas defendant believed that the ski mask should be suppressed because he found it irrelevant to the trial issues, Dunham believed the ski mask should come in as evidence because it was damaging to the prosecution's case since there was no human DNA to link the ski mask to defendant. Dunham believed that the delay in the results was favorable to defendant no matter what happened. Dunham explained that if there were no DNA results, he would be able to blame the prosecution and the police for this, that if the results were favorable to defendant, such would come in as proper exculpatory evidence, or that if the results were unfavorable to defendant, Dunham would argue to suppress the results based on unfair surprise.

We find that defendant has failed to demonstrate that Dunham's performance fell below an objective standard of reasonableness, or that defendant was prejudiced by counsel's defective performance. Dunham presented a reasonable trial strategy regarding the admission of the test results from the ski mask. *Rockey*, *supra* at 76. Furthermore, if Dunham objected to the admission of the ski mask itself, there was sufficient other evidence presented at trial regarding the use of a black ski mask during the bank robbery. Finally, there is no indication, and defendant fails to so show, that the ski mask could have been suppressed in any way. Thus, defendant has failed to demonstrate that he was prejudiced by Dunham's decision not to suppress the ski mask from evidence, or by Dunham's strategy of waiting for the test results from the ski mask.

D. Failure to Cross-Examine

Finally, defendant contends that Dunham was ineffective because he failed to impeach a prosecutorial witness regarding the witness's statement that he was "99%" certain that the four-wheeler was on his property on the day of the offense. As conceded by defendant in his brief on appeal, Dunham examined this issue during trial. Accordingly, defendant has failed to

demonstrate that Dunham's performance fell below an objective standard of reasonableness, and has failed to demonstrate that Dunham's performance prejudiced defendant.

E. Conclusion

Based on the above analysis, we conclude that defendant has failed to demonstrate that Dunham's performance fell below an objective standard of reasonableness, or that defendant was prejudiced by Dunham's performance. Therefore, defendant has failed to demonstrate that he was denied the effective assistance of counsel.

III. Prosecutorial Misconduct

Defendant next contends that the prosecution committed misconduct with respect to its handling of the ski mask evidence. Specifically, defendant argues that the delay in the DNA examination of the ski mask was unjustified and attributable to the prosecution. We disagree. This Court generally reviews claims of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

"A prosecutor has a duty to 'make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the offense[.]'" *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001), citing MRPC 3.8(d). Defendant's prosecutorial misconduct argument centers on defendant's motion to dismiss the case based on the DNA results obtained from the ski mask. Defendant contended that the prosecution did not report the test results to defendant until the Friday before trial. The trial court inquired of defendant whether he requested that certain tests be performed, to which defendant responded that he wanted the results from all tests performed.

Following defendant's motion, Detective William Kanouse informed the trial court that the ski mask was sent to the trace evidence unit for testing, at which time dog hair was found in the ski mask. Kanouse explained that no human hair was discovered in the ski mask, and that no DNA testing was requested on the mask because there was nothing found in the ski mask that could be tested. The trial court denied defendant's motion to dismiss, indicating that although there was a delay in getting the report to defendant by the Michigan State Police, there were no results to report.

We find that defendant has failed to demonstrate that the prosecutor committed misconduct with regard to the ski mask test results. There is no indication from the transcripts or from defendant's brief on appeal that the delay in the DNA examination or the DNA report was caused by the prosecution. In fact, defendant fails to connect his argument regarding his motion to dismiss with any specific prosecutorial act whatsoever. "'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.'" *Traylor, supra* at 464. Accordingly, defendant has failed to substantiate his claim of prosecutorial misconduct.

Additionally, defendant argues, in propria persona, that the prosecution committed misconduct by violating certain discovery rules throughout the duration of the trial. We disagree. As previously stated, this Court generally reviews claims of prosecutorial misconduct de novo. *Pfaffle*, *supra* at 288.

First, defendant apparently alleges a violation of MCR 6.201, contending that the prosecution failed to present to defendant the test results regarding the ski mask prior to trial or within seven days of the discovery request. The court rules require that a party must provide, upon request, "any report of any kind produced by or for an expert witness whom the party intends to call at trial," as well as "any document, photograph, or other paper that the party intends to introduce at trial." MCR 6.201(A)(3) and (5). Defendant also cites MCR 6.201(B)(1), which indicates that the prosecuting attorney must provide, upon request, "any exculpatory information or evidence known to the prosecuting attorney." Finally, defendant argues that the prosecution violated MCR 6.201(F), which provides that "the prosecuting attorney must comply with the requirements of this rule within 7 days of a request under this rule and a defendant must comply with the requirements of this rule within 14 days of a request under this rule." In addition to the rules cited by defendant, MCR 6.201(H) provides that "[i]f at any time a party discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party."

In the instant case, there was no indication, and defendant fails to show otherwise, that the prosecution violated MCR 6.201. There was no evidence or testimony that the prosecution had the test results, or lack thereof, long before defendant obtained them, or that the prosecution failed to timely provide defendant with any results. Indeed, the record demonstrates that defense counsel was aware of the same information as the prosecution. Therefore, defendant has not shown that the prosecution violated any portion of MCR 6.201.

Defendant also alleges that the prosecutor committed a *Brady*[3] violation because of the delay of the results, or lack thereof, regarding the ski mask. "In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).

We find that defendant has failed to demonstrate that the prosecution committed a *Brady* violation in this case. First, there was no indication that the prosecution possessed evidence favorable to defendant. As previously stated, the analysis of the ski mask revealed that no results were obtained from the ski mask. Even if viewed as favorable evidence, defendant has failed to demonstrate that the prosecution suppressed any evidence, and fails to identify any evidence that was allegedly suppressed at trial. At trial, Kanouse informed the court that the mask had been sent for analysis, but that no analysis or results had been obtained, and that the only evidence found on the ski mask was dog hair. Based on defendant's failure to identify the suppression of

[3] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

any evidence, defendant has failed to demonstrate that a reasonable probability exists that the outcome of the proceedings would have been different if the alleged "evidence" had been disclosed to defendant. Defendant's argument merely reflects that disclosure of the absence of test results was allegedly untimely, and does not indicate that there was a suppression of any evidence. Thus, defendant's argument that the prosecution committed a *Brady* violation fails.

Finally, defendant contends that evidence was discovered after his trial, which was withheld from defendant at trial. Defendant fails to explain what the new evidence is or what the new evidence demonstrates, and fails to argue how such evidence prejudiced him. Additionally, defendant fails to indicate how the prosecution violated the discovery rules with respect to this evidence. "'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.'" *Traylor, supra* at 464. Accordingly, defendant's claim that the prosecution violated the discovery rules fails.

IV. Bindover/Sufficiency of the Evidence

Finally, defendant argues, in propria persona, that the district court erred in binding him over for trial because it made no findings regarding the specific elements on each of the elements of the charged crimes, or alternatively, that there was insufficient evidence presented at trial to connect defendant to the charged crimes. We disagree.[4] This Court reviews issues regarding the sufficiency of evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Regarding his claim that there was insufficient evidence to support his convictions, defendant does not contest that an armed robbery took place or that a firearm was utilized during the commission of such. Rather, defendant's arguments center on the lack of a connection between defendant and the charged crimes.

We find that there was sufficient evidence to connect defendant to the offenses in this case. Trial testimony demonstrated that Baker noticed a four-wheeler drive past the bank, and approximately five minutes later, the robber entered the bank. The robber was described as a man wearing a black knit ski mask, gold wire or dark sunglasses, a camouflage hooded sweatshirt, and black knit gloves. Baker testified that $15,100 was taken from the bank on December 1, 2000, including three twenty dollar bills, which were used as bait money.[5] As the robber was leaving, he told the tellers to have a nice or good day. After the robber left, Baker

[4] Because we ultimately conclude that there was sufficient evidence presented in this case and errors or deficiencies in the proofs at the preliminary examination are deemed harmless if sufficient evidence is presented at trial to convict the defendant of the charges, *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996), we decline to address defendant's bindover argument and instead focus on the sufficiency of the evidence claim.

[5] "Bait money" was described as the documentation of an amount of bills kept in a teller's drawer that are used to track bills to an individual. "Bait money" was also described as five twenty dollar bills, recorded by their serial numbers, and which are kept in the teller's drawer until they are handed out or someone takes them.

saw the four-wheeler drive past the bank again, and Reed indicated that the four-wheeler drove off to the east.

At approximately 9:30 a.m. on the same day, David Stoll was driving his combine to his field when he saw a red, mid-sized car drive past him at a fast rate of speed, almost driving into the ditch in an effort to pass the combine. David noticed no objects in the road while he was driving. Approximately thirty minutes later, David's brother, Levi Stoll, drove to the combine location and discovered a black ski mask lying on the shoulder bank of the road. Birden Boone testified that as he and defendant were driving in a red Grand Am, he saw defendant throw a black hat out of the car window while they drove past a combine.

Harry Briskey testified that he and defendant went to steal a motorcycle the night before the robbery, but that they actually stole a four-wheeler. Boone heard defendant and Briskey talk about getting the four-wheeler. Briskey indicated that defendant wore a dark blue or black ski mask when they stole the four-wheeler. There was also evidence that defendant removed some plywood from the front of the four-wheeler after stealing it and upon his return to his house. Kanouse located a piece of plywood with gun racks from the rear of a red barn on defendant's property. The owner of the four-wheeler, Charles Boothe, testified that he had a platform and a gun rack installed on the front of the four-wheeler for hunting purposes. Finally, the stolen four-wheeler was located in Teddy Yates' sister's garage, after which the police discovered that Yates obtained the stolen four-wheeler from defendant.

There was also evidence that defendant informed Briskey that he would have to either declare bankruptcy or rob a bank, and that defendant showed Briskey the route he would take to rob the bank. On the day of the robbery, Boone saw defendant placing money in a bag, and heard defendant state that he "did it," which led Boone to believe that defendant robbed the bank. Defendant also informed Boone of specific details of the robbery, such as the fact that certain drawers were locked and that defendant told the bank tellers to have a nice day. Defendant also informed Boone that he dropped some of the money in the wall of defendant's convenience store, which was later retrieved by Kanouse. Also found in defendant's store were the three twenty dollar bills in bait money along with several wrappers from the North Adams branch of the Southern Michigan Bank and Trust that were marked with a stamp similar to that of money wrappers typically contained within Baker's drawer.

Given that there was sufficient evidence to connect defendant to the armed robbery and the lack of dispute that a firearm was used to commit the robbery or that the robbery took place, there is also sufficient evidence to support defendant's convictions for felony-firearm and felon in possession. See MCL 750.227b; MCL 750.224f. Indeed, in connection with the felon in possession offense, defendant stipulated that he had been convicted of a qualifying felony and that it had been less than three years since his fines were paid, and merely contested that he was in possession of a firearm. Accordingly, any error in binding defendant over would be harmless, as there was sufficient evidence to support defendant's convictions.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Christopher M. Murray